IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-781

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL,
Petitioners,

v.

THE ARLINGTON COUNTY BOARD, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to The Supreme Court of Virginia

BRIEF IN OPPOSITION FOR RESPONDENTS

1421 S. Ferne Street, Inc., 1411 S. Ferne Street, Inc., 1401 S. Ferne Street, Inc., 1311 S. Ferne Street, Inc., 1301 S. Ferne Street, Inc., 1221 S. Ferne Street, Inc., 1211 S. Ferne Street, Inc., 1201 S. Ferne Street, Inc., ARNA-FERN, Inc., 1400 Eads Street, Inc., 1200 Eads Street, Inc., 1101 Ferne Street, Inc., ARNA-EADS, Inc., Pentagon Tract Dev. Corp., and River House Corporation

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JURISDICTION

Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1257(3). However, this Court has repeatedly held that it will not properly review an issue under that provision unless the issue presented for review

was properly presented to, and passed upon by, the State court below. *E.g., Hill* v. *California,* 401 U.S. 797, 805 (1971); *Atlantic Coast Line RR Co.* v. *Mims,* 242 U.S. 532, 535 (1917). The purpose of this rule is to assure that state courts are first afforded the opportunity to consider and decide the federal question. *Hill* v. *California, supra,* 401 U.S. at 805.

The question of "procedural due process" now presented to this Court was simply never presented to the Supreme Court of Virginia in a manner which would have qualified it for consideration by that Court—or even in a manner which gave that Court a decent opportunity to take notice of the precise issue petitioners had in mind.

The petitioners indisputably failed to include the Constitutional issue raised here among the five specific assignments of error listed in their Petition for Appeal to the Supreme Court of Virginia. That failure alone is dispositive of the question of whether the issue raised here was first properly presented below, for Rule 5:21 of the Rules of the Supreme Court of Virginia [1] provides:

> Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below.

[1] The purpose of the Virginia rule is to point out errors with reasonable certainty in order to direct the Supreme Court and opposing counsel to the points on which the appellant intends to ask a reversal of the judgment, and to limit discussion to these points. *Harlow* v. *Commonwealth,* 195 Va. 269, 77 S.E.2d 851 (1953); *Omohundro* v. *County of Arlington,* 194 Va. 773, 75 S.E. 2d 496 (1953).

Had petitioners merely included the "fundamentally important" Constitutional issue (Petits.' Brief at 15) they raise here among the specific assignments of error presented to the Virginia Supreme Court, that court might have been put on notice of the alleged importance of the issue and could have given it due consideration. Instead, the closest petitioners came to presenting that issue to the court below was in the following cryptic footnote, buried in the 37th page of a 50-page petition:

> "* As stated in the Petition for Declaratory Judgment, appellants maintain that the Board action of February 25, 1976 constituted a violation of the Board's duty under the Fourteenth Amendment the [sic] Constitution of the United States. Although precluded by this Petition's pagination limit from fully setting forth that argument, appellants nevertheless intend to rely upon it and specifically preserve it for consideration on appeal."

Not only does this vague footnote reference fall short of the specific assignment of error required by Virginia Supreme Court Rule 5:21, but it does not even approach the degree of specificity needed to satisfy the requirement that the issue be "properly presented" to the court below. *C.I.O.* v. *McAdory,* 325 U.S. 472, 477 (1944). The petitioners' footnote did not even apprise the Virginia Court of *which* clause of the Fourteenth Amendment they were invoking,[2] much less as to how that unspecified clause had allegedly been violated by

[2] Constitutional challenges to zoning-related actions are frequently based upon the Equal Protection Clause of the Fourteenth Amendment, as well as upon the Due Process Clause. *See, e.g., Village of Euclid* v. *Amber Realty Co.,* 272 U.S. 365, 384 (1926).

the Board's proceedings. Thus, since the question presented here "was not asserted at a time or in a manner calling for its consideration by the highest state court under its established system of practice and pleading", *Atlantic Coast Line RR Co.* v. *Mims, supra,* 242 U.S. at 535, this Court should not exercise jurisdiction to review it on writ of certiorari.

QUESTIONS PRESENTED

1. Where the rules of practice and pleading of the highest State court below provide that it may not admit as a ground for reversal of the decision below any ground not assigned as error in the petition for appeal to that court, and where the petitioners failed to assign as error to that court the sole question presented for review in their petition for Writ of Certiorari to this Court, should this Court grant a Writ of Certiorari to review that question? (Respondents' discussion of this question is set forth under the heading "Jurisdiction," *supra.*)

2. Where those opposing rezoning in a local legislative zoning board proceeding had a full and fair opportunity to present their views in opposition in hearings before the board and in a subsequent trial *de novo* of the issues in a state court, are such opponents deprived of procedural due process under the Fourteenth Amendment because the board and the court did not deny the rezoning in question on the basis of alleged traffic and pollution consequences, where the effect and magnitude of such consequences were disputed in the proceedings?

STATEMENT

Petitioners seek the Court to review the decision of the Supreme Court of Virginia denying an appeal of the Arlington County Circuit Court's (the "Circuit Court") judgment sustaining a decision of the Arlington County Board (the "Board") authorizing the rezoning of certain lands owned by these Respondent-Intervenors (hereinafter referred to as the "Landowners").[3]

As shown by the particular examples listed below, petitioners' Statement of the Case presents a grossly distorted picture of the lengthy, thorough and conscientious procedures followed by the Board and the Circuit Court. The reality is that the Board, presented with a carefully-structured proposal for locating needed high-density development in an area which was already zoned for high-density use (XX pp. 83-86), and which would optimize use of newly built mass transit facilities already situated on the site, exercised its legislative judgment by granting the developers a high-density zoning approval which was substantially *less* than they had actually proposed (Petit., App. A, 8a).[4]

Contrary to petitioners' assertions, the Board did not make its decision without investigation, or in the

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[3] The landowners were defendant-intervenors in the proceedings below in both the Arlington County Circuit Court and the Supreme Court of Virginia.

[4] The abbreviations "PX" and "DX" refer to exhibits offered by the petitioners and the respondents, respectively, at the trial. References to Roman numerals are to the indicated volume of the trial transcript. The memorandum opinion of the trial court will be cited by reference to the appropriate page of the copy of that opinion set forth in Appendix A to the petition for certiorari.

face of collective opposition from the various specialized County agencies having an interest in the matter. A detailed 65-page transportation analysis, setting forth in graphic detail projected traffic congestion consequences, was submitted to the Board and debated in numerous hearing sessions before the Board (PX 10). The County Planning Staff, the Planning Commission and the County Manager all recommended in favor of the rezoning (DX 30, pp. 1, 6; PX 5, p. 1). Thus, the stated opposition of the County Transportation Commission, a citizens' advisory board of no particular expertise (VI, pp. 20-21), was but one of numerous viewpoints which the Board heard and considered in reaching its decision.

Petitioners had every opportunity to express their opposition to the rezoning action in multiple public hearings before the Board and in the 12-day *de novo* review of the decision in the Circuit Court. Petitioners were entitled to challenge the wisdom of the proposed rezoning, but they were not entitled, as they are now asserting, to have the Board and the successive reviewing courts accept as dispositive their particular views as to the gravity of traffic congestion or pollution consequences. Rather, as stated by the trial judge (Petit., App. A, p. 3a):

> The issue is not whether the Court favors or does not favor the building of the proposed "Pentagon City". The issue is whether the County Board in enacting the zoning legislation acted in a manner which was clearly unreasonable, arbitrary or capricious and without reasonable or substantial relation to the public health, safety, morals or general welfare. A further legal principle involved is that: "The Court will not substitute its judgment for that of a legislative body, and if the reasonable-

> ness of a zoning ordinance is fairly debatable, it must be sustained." *Fairfax County* v. *Allman*, 215 Va. 434 (1975).
>
> The Court finds that the reasonableness of the zoning and site plan action was clearly debatable. Accordingly it is sustained and the prayers of the Petitioners are denied.

Beyond its inaccurate portrayal of the nature of the proceedings below, the petitioners' Statement of the Case also contains numerous particular statements which are either directly contradicted or unsupported by the actual record below. Among the more fundamental examples of such errors are the following:

1. In paragraph (3), petitioners quote from a report which they then state represents the recognition by the Arlington County Board that the Pentagon City Tract involved in the zoning decision in issue "will have a direct adverse impact upon the property values of these petitioners." In fact, the report in question was a 1973 report, concerning an area-wide neighborhood conservation plan not related to the 1976 rezoning proposal for Pentagon City, which was offered for the limited purpose of establishing standing (I., pp. 67-69). As such, that report can hardly be cited as representing the Board's perceptions of the effects of the specific rezoning proposal for Pentagon City which was before it in this case. Further, the trial court specifically found that "The plaintiffs have *not* proved in terms of dollars that their specific property interests will be harmfully effected by the increased traffic." (Petit., App. A, p. 3a).

2. In paragraph (4), petitioners describe the proposed zoning as allowing ". . . the construction of a

huge physical plant, including a series of 22-story buildings with a vast physical capacity." The "series" of 22-story buildings consist, in fact, of only 4 such buildings. The "vast physical capacity" described by Petitioners was in fact a relatively minor increase in density (Petit., App. A, p. 8a), and was less intense than development could have been under the pre-existing zoning with site plan approval (DX4, DX10, DX20, DX27; XX at 83-86). High-density zoning had existed on the subject site for an extended period of time, and was in keeping with Arlington County's adopted general land-use plan (Petit., App. A, p. 8a).

3. In paragraph (5), petitioners assert that there was no dispute concerning the jammed traffic conditions at peak-hours projected for three intersections in the rezoned tract by 1990 in a transportation analysis report submitted to the Board. In fact, the author of the report testified at the trial that those projected conditions would probably not occur in fact, noting that they were based upon certain theoretical assumptions (e.g., that no traffic would resort to longer alternate routes, even if the shortest routes were congested) which he was constrained to accept for purposes of the study (XI, pp. 63-71, 102-103; Petit., App. A, p. 7a). The County Highway engineer also testified as to his opinion that the F-level jammed conditions would not eventuate in reality (XV, pp. 18, 37-52; Petit., App. A, p. 7a).

4. Petitioners repeatedly characterize the "F-level" peak-hour traffic conditions projected for three intersections in the tract by 1990 in the initial planning report as "unacceptable" aspects of any development proposal. Yet petitioners' own witness acknowledged

that, by 1992, *50%* of all peak-hours vehicle trips in the whole Washington metropolitan area would be made at service levels similar to those levels projected for the worst intersections of the proposed development at peak-hours in 1990. (XXIII at 5, 16, 43-48).

5. In paragraph (13), petitioners assert that there was no testimony or evidence identifying any method for alleviating jammed peak-hour traffic conditions which might occur in the proposed development. The record shows, however, that the County and the property owners pointedly demonstrated a variety of specific means to alleviate such conditions. (e.g., Petit., App. A, p. 7a; XVII at 9-10; 26-27).

6. In paragraph (14), petitioners set forth, *inter alia,* the proposition that the Pentagon City development "will seriously exacerbate the [air pollution] situation in terms of human health" and then further assert that this proposition "was literally undisputed at trial." In support of this specific and wholly unqualified statement, petitioners cite nothing more than the hypothetical opinion testimony of *their* witness that jammed traffic conditions he was asked to *assume* for purposes of the question would "contribute to"—not "seriously exacerbate"—photochemical oxidant pollution (VII at 108-09).

7. Finally, petitioners' paragraph (15) sets forth their own subjective assessment that the trial court "misunderstood" the legislative record because he cited in his opinion the sharp conflict in expert testimony which highlighted the trial *de novo,* whereas petitioners stress that there was no "clash of experts" before the Board. If the petitioners' observation in that regard proves anything, it is only that the peti-

tioners reserved their expert opposition testimony for the court proceeding. It in no way supports petitioners' suggestion that the expert evidence before the Board on traffic congestion was uniformly dismal, since the expert traffic forecast which *was* presented to the Board concluded that the level of traffic service would be acceptable and that congestion potential could be minimized (PX 10, p. 65). More to the point, all that the reviewing court had to "understand" on review was that the Board's decision was based on proper legislative considerations and was neither arbitrary nor capricious.

ARGUMENT

Even if this Court could properly take cognizance of an issue which was not articulated or assigned as grounds for reversal to the court below, the question presented does not begin to satisfy the applicable criteria of Rule 19(a) of the Rules of the Court. The Court has many times laid down the criteria for judicial review of local legislative zoning actions under the Fourteenth Amendment, and the rulings of the Virginia courts below were in complete accord with them. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328 (1927). The only possible distinction between those cases and the question presented here is rhetorical rather than substantial; petitioners have merely characterized what is nothing more than their disagreement with the results reached below in the guise of a "procedural" due process argument.

However, the petition for certiorari is devoid of any claim that petitioners were denied a full and fair hearing of their views by the County Board or the Trial

Court.[5] Instead, the petition is replete with allegations that the Board did not "understand the consequences of its action" and that the trial judge "misunderstood what had transpired before the Board" (Petit. pp. 7, 9-10). This Court could not undertake to probe the mental processes of a legislative body such as the Arlington County Board to ascertain whether it "understood" what it was doing, *see United States* v. *Morgan*, 313 U.S. 409, 422 (1941), any more than the Virginia courts below could undertake to do so, *see Blankenship* v. *City of Richmond*, 188 Va. 97, 49 S.E. 2d 321 (1948). Rather, the zoning proceedings below satisfy due process requirements so long as (1) the results reached were "fairly debatable" or, put another way, not arbitrary or capricious, *Euclid* v. *Ambler Realty Co., supra;* and (2) the proceedings "secure to adverse parties an opportunity to be heard, suitable to the occasion", *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 246-47 (1944).

Little need be said to show that the results of the zoning proceedings below were in accord with this Court's "fairly debatable" standard of substantive review. It takes only a brief reading of the Circuit Court's opinion appended to the petition for certiorari to see that this case falls squarely within the rule stated by the Court in the *Zahn* case, *supra*, 274 U.S. at 328:[6]

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[5] They could hardly do so in light of the fact that they were allowed to argue and produce evidence in support of their position at multiple public hearings before the County Board and its advisory commissions and in twelve days and two evenings of testimony before the Circuit Court in a trial *de novo*.

[6] This case, unlike *Moore* v. *East Cleveland*, U.S. , 52 L.Ed.2d 531 (1977), is *not* one where the "... usual judicial def-

> The most that can be said is that whether that determination was an unreasonable arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that *it will not substitute its judgment for that of the legislative body charged with the primary responsibility of determining the question.* [emphasis added].

The whole thrust of petitioners' argument that the Board's decision was "unreasonable beyond debate" lies in their partisan philosophical disagreement with the means chosen by the Board to cope with the complex problem of structuring and locating inevitable high-density devlopments in a manner which is in harmony with rational development of an expanding metropolitan complex.

Thus, petitioners harp upon the allegation—contradicted by the record—that the Board and the trial court arbitrarily disregarded the impact of certain levels of traffic congestion [7] said to be the direct and inevitable consequence of its rezoning decision.

Initially, the record refutes petitioners' suggestion that the evidence before the Board and the court inexorably pointed to an insoluble traffic situation. Thus,

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erence to the legislature is inappropriate" because of any "intrusive regulation of the family" or other areas of personal liberty. All that is even arguably involved here is a speculative effect on property values which petitioner failed to prove below (Petit. App. A, at 3a).

[7] Needless to say, the traffic congestion produced by a zoning action is but one of the multiple inter-reacting considerations that must be taken into account in making a legislative zoning decision. Petitioners argument implies, and is really dependent upon, the erroneous premise that this one issue eclipses all other factors the Board had to consider.

while the initial report prepared for the County by traffic expert Pratt (the "Pratt Report") forecasted the possibility of "F-level" conditions at three intersections by 1990 based on a given hypothetical assumption that traffic in the area would be restrained from taking alternate routes, Mr. Pratt testified at trial that he did not believe such levels would in fact occur on the tract (XI at 102-103).[8] There was further separate testimony that such levels of congestion may not occur over a sustained period where alternate routes are available (XV at 18, 37-52). Meanwhile, petitioners' expert witnesses prepared no report of their own. but confined themselves to second-guessing the Pratt Report. Thus, the trial judge accurately stated the case when he observed [Petit., App. A at 8a]:

> When qualified experts are in genuine disagreement in their forecasts of conditions in 1990, then for the County Board to accept one view or the other is neither arbitrary nor capricious.

Here, the County Board elected to approve the Pentagon City Tract rezoning in order to, *inter alia,* locate high-density development on the site of an existing Metro subway station, which is in turn surrounded by a complex of interstate highways and arterials, so as to encourage mass transit usage and divert traffic flow from adjoining residential areas (Petit., App. A, pp.

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[8] Mr. Pratt's trial testimony was wholly consistent with the conclusion of the report presented to the Board, which said (PX 10 at 65):

> The Pentagon City street grid as recommended provides an acceptable level of traffic service at all internal locations, with congestion potential . . . being restricted to three perimeter intersections. Recommendations and suggestions have been provided for minimizing those localized negative impacts that must be accepted in order to gain the overall environmental benefit of the development.

2a; PX 10, p. 65). Since the trial court found that these and other beneficial objectives would be served by the rezoning decision (Petit., App. A, at 9a-10a), what this Court said 41 years ago in the *Euclid* case is directly in point here and lays to rest petitioners' contention that the Board's decision bears no "rational relationship to permissible state objectives" (Petit. p. 13):

> [T]he reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. [272 U.S. at 395]

Petitioners do not dispute that they were afforded every opportunity to press their views in opposition to the Pentagon City Tract rezoning decision in multiple hearings before the County Board and in a 12-day trial *de novo* in the Circuit Court. Indeed, the citations of adverse comment set forth in petitioners' own brief (Pet., p. 6, ¶ (6)) unwittingly attest to the fact that the fair and open procedures below "secure[d] to adverse parties an opportunity to be heard." Thus, petitioners' contention that they were denied "procedural" due process in the rezoning proceedings gets no further than decades-old decisions of this Court confirming that state procedures directly analogous to those followed in this case are fully in keeping with Fourteenth Amendment procedural requirements. *Anderson Nat'l Bank* v. *Luckett, supra; RR. Comm'n of California* v. *Pac. G&E Co.*, 302 U.S. 388, 395-98 (1938); *Pac. Livestock Co.* v. *Lewis*, 241 U.S. 446 (1916).

Absent from the petition for certiorari is citation to any case of this Court[9] or any other federal court[10] standing for the extraordinary proposition underlying their argument: That due process requires legislative bodies to withhold zoning decisions until they have independently investigated and reinvestigated, to the satisfaction of all persons concerned, every ramification of their decisions which offends someone's notions of what is "acceptable". Petitioners would have it that since the County Board did not ascribe probative force to petitioners' apocalyptic views on traffic congestion, and thereupon suspend all action to "investigate" what the apocalypse would be like, they were deprived of due process. But this Court long ago laid to rest the notion that an administrative body—still less a legislative body—need assign any degree of probative force to a particular set of views as a matter of procedural right. As stated by the *Court in Railroad Comm'n of California* v. *Pac. G&E Co., supra,* 302 U.S. at 395-98:

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[9] *Euclid* and *Moore*, both cited by petitioners in support of their "procedural" arguments, plainly have nothing to do with the adequacy of procedures. *Euclid* squarely supports affirmance in this case, *see* pp. 11, 14, *supra*, and *Moore*, having to do with intrusions on personal choice in family living arrangements, concerns wholly distinct issues.

[10] *Citizens Association of Georgetown, Inc.* v. *Zoning Comm'n of D.C.*, 155 U.S. App. D.C. 233, 477 F.2d 402 (D.C. Cir. 1973), also relied on heavily by petitioners, was a decision interpreting the D.C. Administrative Procedure Act with respect to the requirement for a statement of reasons in support of zoning decisions. Federal Constitutional law was simply not involved and the portion of the opinion quoted by petitioners (Petit. at 13-14) was acknowledged by the Court to be *dicta* on an issue which was "not before the court", 477 F.2d at 410.

> Whether in this instance the Commission was in error in treating respondents estimates as without probative force, we have no means of knowing as the evidence is not before us, *but its error in that conclusion, if error there be, was not a denial of due process.* [emphasis add].

All that remains, therefore, is whether the Virginia procedure of Board hearings followed by *de novo* review in the Circuit Court afforded petitioners a full and fair hearing compatible with due process. On this score, all the petition seems to suggest is the remarkable notion that because the reviewing court entertained and considered the testimony of petitioners' experts in *opposition* to the rezoning, which testimony had not been offered to the Board, the *Board* proceedings should therefore be viewed as somehow retroactively deficient (Petit., pp. 9-10, ¶ (15)). The simple answer to this is that the Board heard and considered all the opposition testimony and evidence that petitioners saw fit to present it. Further, petitioners' argument proceeds on the erroneous legal premise that the thorough judicial review of the Board's action which they obtained in the County Circuit Court is not to be taken into account in determining whether they were afforded "procedural" due process. On the contrary, such judicial review afforded petitioners their full measure of due process. *Anderson Nat'l Bank* v. *Luckett, supra,* 321 U.S. at 246-47; *Pac. Livestock Co.* v. *Lewis, supra,* 241 U.S. at 451. As the Court flatly stated in the *Lewis* case:

> That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the Court is not debatable. [*Id.* at 451]

Therefore, since the petition for certiorari does not even allege that the trial court proceeding was "procedurally" defective"—alleging only that the judge "misunderstood" the issues—there is simply no remaining basis to the petitioners' "procedural" due process contentions.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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